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Hot Topic
"Future Worker"

Revised

STATEMENT OF THEODORE J. ST. ANTOINE
JAMES E. AND SARAH A. DEGAN PROFESSOR OF LAW
UNIVERSITY OF MICHIGAN

BEFORE

COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF LABOR
WASHINGTON, D.C.
April 6, 1994

Mr. Chairman and Members of the Commission: My name is Theodore J. St. Antoine. I am a Professor of Law at the University of Michigan, where I have taught labor and employment law since 1965. For the past twenty years I have been a parttime labor arbitrator. I have also served on the Board of Governors of the National Academy of Arbitrators and as a reporter for the Uniform Law Commissioners' Drafting Committee on the Uniform Employment Termination Act.

Your Commission has an opportunity to provide the framework for what could be the most significant changes in the federal law regulating the workplace since the passage of the Wagner Act in 1935. I am deeply appreciative of the invitation to present my views to you on the use of alternative dispute resolution procedures. I beg your indulgence in permitting me first to say a few words on the one aspect of that subject about which I have experience that is unique among the distinguished group of witnesses you have assembled for today's hearing. That is the proposal for legislation, like the Model Employment Termination Act, to prohibit the wrongful discharge of employees.

In my opinion, the most important development in the whole field of labor and employment law during the past couple of decades did not occur at the federal level. It was the movement in the state courts of some 45 jurisdictions to modify the once universal doctrine of employment at will. As bluntly expressed by one nineteenth century American court, that meant employers could "dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong." Payne v. Western & Atlantic R.R., 81 Tenn. 507, 519-20 (1884). Workers could be fired for refusing to engage in illegal price-fixing, for serving on a jury, or for espousing political positions contrary to those of management.

At-will employment remains a substantial practical problem today. Professor Jack Stieber of Michigan State University calculates that there are 60 million at-will employees in the United States, of whom about two million are fired annually. Of these, Stieber believes 150,000 or more would have valid causes of action if they had the same "just cause" rights afforded nearly all union workers under collective bargaining agreements. Stieber, "Recent Developments in Employment-at-Will," 36 Labor Law Journal 557, 558 (1985).

The state courts have used three principal theories to modify employment at will. Each has serious deficiencies for employees and employers alike. The first is the public policy exception. But that takes an egregious violation, such as discharging an employee for refusing to commit a crime.

Relatively few employees will find that modification useful.

Second is the contract exception. An employer may be held liable for an arbitrary dismissal if it has included a guarantee of no discipline except for good cause in an employee handbook. But an employer can avoid that restriction by simply refraining from any such assurances, or even by excising any existing protections from personnel manuals with adequate advance notice.

The third and potentially most expansive theory, the notion that every contract contains an implied covenant of good faith and fair dealing, has doctrinal infirmities and has been accepted by only a handful of states.

Finally, the employees who win in court are rarely rank-and-file workers. Only professional and managerial employees are likely to have large enough claims to attract the attention of lawyers operating on the basis of contingent fees.

On the other hand, when an employer becomes enmeshed in a common-law wrongful discharge action, the results can be a heavy financial blow. Several studies of California cases showed that a plaintiff employee who can get to a jury will win about 75 percent of the time, with the average award around \$450,000. Multimillion dollar verdicts for single individuals are not uncommon.

Even the successful defense of a jury case may cost \$100,000 to \$200,000. And two years ago a RAND study estimated that the "hidden costs" of the common-law regime--for example, keeping on inefficient employees out of a fear of expensive lawsuits--amount

to 100 times as much as the court judgments and other legal expenses.

Remedial legislation is needed for the benefit of everyone, employers as well as employees. In August 1991 the National Conference of Commissioners on Uniform State Laws adopted, by the resounding vote of 39 state delegations to 11, the Model Employment Termination Act (META).

I had the privilege of serving as "reporter," or principal draftsman, for the Commissioners' drafting committee, and so I may have some bias in favor of our final product. At the distance of almost three years, however, I still consider it a fair and balanced compromise of the competing worthy interests of workers and management. I have submitted an official copy of the text of the Act, with accompanying commentary, for inclusion in the Commission's records.

META prohibits the dismissal of most full-time employees (those working 20 or more hours a week) after one year of service unless there is "good cause." Good cause is essentially the same familiar standard that appears in most collective bargaining agreements and has been applied in tens of thousands of arbitrations over the past half century.

The preferred method of enforcing META is through the use of professional arbitrators. The remedies are similar to those under the National Labor Relations Act and the original 1964 Civil Rights Act, namely, reinstatement with or without back pay. General compensatory and punitive damages are expressly excluded.

There is also a displacement or extinguishment of common-law tort or implied contract actions based on an employee's termination.

The result of this sophisticated scheme is a sensible trade-off. Employees are guaranteed certain irreducible substantive rights. In return employers are relieved of the risk of crushing legal liability. Both sides are provided procedures that should be simpler, faster, and cheaper than the current jury system.

Despite its overwhelming endorsement by the Uniform Law Commissioners, META faces formidable barriers to enactment. One of the most troublesome is the fear of the various states that adoption would place a state at a competitive disadvantage in relation to other states. I believe that worry is misguided but it is very real. The solution, as is so often the case in the labor field, would be the passage of a federal statute like META covering the entire country.

A federal law could also eliminate an employer objection to wrongful discharge legislation which I feel has considerable merit. That is the proliferation of tribunals and the subjection of employers to a series of actions in several different forums. We have tried to minimize this difficulty in META by providing that principles of res judicata apply whenever possible. But of course state law cannot control federal law and separate federal actions.

I urge the Commission to think boldly about the problem of multiple forums. Perhaps it is time to replace the National Labor Relations Board and the Equal Employment Opportunity

Commission with a single National Employment Relations Board. This restructured agency could have jurisdiction not only over antiunion discrimination, but also over "status" discrimination on the basis of race, sex, age, disability, etc., and finally over terminations without good cause. To handle the increased caseload, the new Board might operate through regional panels, with discretionary review by a centralized body to resolve any conflicts that may develop at the local level.

All those are procedural questions that deserve much further airing. But on the central substantive issue, the right of employees not to be terminated without good cause, the United States is out of step with every other major industrial democracy in the world. Some 60 countries, including all our leading international competitors, have heeded the call of the International Labor Organization for the legal protection of workers' jobs.

A few persons persist in arguing that at-will employment is justified by freedom of contract. Anyone familiar with the realities of the industrial world knows there is rarely equality of bargaining power between the corporate employer and the solitary employee. The severance of any single employment relationship is usually far more damaging to the employee than to the company.

Besides the economic deprivation, numerous studies document the devastating psychological injury and social disruption suffered by a worker and a worker's family when a job is lost.

In my judgment, the requirement of good cause for dismissal has now become a moral and historical imperative. I strongly urge you to recommend that federal law include freedom from unjust discharge among the basic rights of American workers.

Let me now turn to the use of voluntary, contractual arbitration, rather than statutorily imposed arbitration, as the means of enforcing substantive rights under such statutes as the various civil rights and antidiscrimination laws. Once again, my experience in the drafting of the Model Employment Termination Act is revealing. This country's regard for freedom of contract was reflected in the Uniform Law Commissioners' insistence that we permit employers and employees to opt out of the statutorily prescribed arbitration procedures and agree instead on private arbitration or other alternative mechanisms for resolving an employee's claim. Industrial relations specialists rightly tend to view freedom of contract with suspicion in the employment context because of the usual imbalance in bargaining power. Nonetheless, the natural appeal of the concept is almost irresistible, and that should be a factor in the Commission's deliberations.

What is critical is that adequate procedural or "due process" safeguards be installed to ensure that statutory rights are not impaired by private adjudicators. That will probably also mean somewhat more searching judicial review than we are used to when only contract claims are at stake. The Model Act, for example, provides for vacation of an award if the arbitrator

commits a prejudicial error of law. I realize this creates the risk of diluting the finality that is one of the great virtues of arbitration as we have come to know it in the collective bargaining setting. But when sensitive individual rights under antidiscrimination and other protective legislation are involved, I doubt that the courts will remain aloof and let an arbitrator mangle an employee's claim.

As we know, the Supreme Court has already sustained an individual brokerage employee's agreement to arbitrate a claim under the Age Discrimination in Employment Act. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991). But that holding was much more limited than some have supposed. It could mean no more than that the employee was obligated to exhaust private arbitral remedies before proceeding to court. It certainly gives no final answer to the question of the weight to be accorded the arbitration award once rendered, despite the distinction drawn between Gilmer and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). In the latter, the Court held that an arbitrator's finding of "just cause" for a termination under a collective bargaining agreement did not preclude the discharged employee's seeking a de novo trial for alleged racial discrimination in violation of Title VII of the 1964 Civil Rights Act.

Alexander should be modified and Gilmer extended to authorize the final and binding arbitration of statutory claims when that is provided for in either a collective bargaining

agreement or an individual employment contract. There would be need, of course, especially in the individual case, for close scrutiny to prevent any possible coercion, surprise, or other overreaching by a more powerful employer. Presumably an amendment of the Federal Arbitration Act, 9 U.S.C. §1, would eliminate the long-standing doubts about the applicability of that statute to contracts of employment.

My views on the desirability of an increasing resort to private arbitration for the resolution of statutory disputes, including civil rights issues, find confirmation in the words of such distinguished federal appellate judges as Alvin Rubin of the Fifth Circuit, Betty Fletcher of the Ninth Circuit, and Harry T. Edwards of the D.C. Circuit. Judge Rubin suggested that "some problems can best be resolved by giving a wider hand to collective bargaining and to resolution of disputes in arbitration." Rubin, "Arbitration: Toward a Rebirth," in Nat. Acad. Arbs., Proc. 31st Ann. Meeting 30, 36 (1979). Even more pointedly, Judge Fletcher declared that "arbitration . . . is the best forum for the grievant. . . . [A]rbitrators have it within their power and their grasp to improve the process in order to accomplish the goals of Title VII." Fletcher, "Arbitration of Title VII Claims: Some Judicial Perceptions," in Nat. Acad. Arbs., Proc. 34th Ann. Meeting 218, 228 (1982).

Perhaps most noteworthy of all are the observations of Judge Harry Edwards, because he was an active practitioner in labor law and an eminent labor scholar at both Michigan and Harvard before

ascending the bench, and because he formerly often expressed "grave reservations about arbitrators deciding public law issues." Edwards, "Advantages of Arbitration over Litigation: Reflections of a Judge," in Nat. Acad. Arbs., Proc. 35th Ann. Meeting 16, 27 (1983). On the basis of his experience on the court, Judge Edwards changed his mind. Said he: "I believe that arbitration should be explored as a mechanism for the resolution of individual claims of discrimination in unorganized, as well as unionized, sectors of the employment market." Id. at 28 (emphasis in the original). Like Judges Rubin and Fletcher, Judge Edwards stressed the speed and cost savings of arbitration as advantages over litigation in the resolving of disputes. The greater informality of arbitration can also be conducive to a lessening of employer-employee hostility, which is especially desirable in the event reinstatement is ultimately ordered.

If private procedures like arbitration, agreed to by the employer and the employee, are to supersede the administrative or judicial procedures prescribed by a statute, there should be guarantees that customary "due process" standards are applicable. With some adaptation, section 101(a)(5) of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, 29 U.S.C. §411(a)(5), dealing with internal union disciplinary proceedings, can provide suitable guidelines. An employee, for example, would be entitled to written specific reasons for a termination, a reasonable opportunity to prepare a case, and a full and fair hearing. To help ensure the use of an impartial hearing officer,

the employee should have a genuine voice in the selection of that person. I also understand that the Federal Mediation and Conciliation Service established certain minimum standards that had to be observed before it furnished arbitrators to employer-sponsored arbitration systems. Those FMCS criteria merit examination.

Next, there is the question of remedy. In traditional union-management arbitration, the accepted remedy is reinstatement, with or without back pay. Other damages, compensatory or punitive, are uncommon. Statutes permitting the use of alternative dispute resolution procedures might very well require that the arbitrator or other private adjudicator be authorized to furnish at least as full a remedy as the statute itself. Otherwise, the binding effect of the arbitrator's award could be limited to fact-finding, or the award could be given no more effect than under existing law. Another alternative would be to conclude that, on the facts of a given case, the union or the employee had deliberately agreed to limit the available remedies in return for other contract concessions by the employer. It's not easy to say whether that should be allowed. But my initial reaction is that the statutory remedy, like the substantive antidiscrimination prohibition itself, ought to be treated as an expression of public policy that could not be overridden by private agreement.

I have a caveat to all this. In my judgment, the National Labor Relations Board has been too quick to conclude that it

should "defer" to arbitration when an individual employee files a charge alleging unlawful discrimination, just because the employee could have raised the issue under a contract grievance procedure. See, e.g., United Technologies Corp., 268 N.L.R.B. 557 (1984), overruling General American Transportation Corp., 228 N.L.R.B. 808 (1977). See also Charles B. Craver, "Labor Arbitration as a Continuation of the Collective Bargaining Process," 66 Chi.-Kent L. Rev. 571, 605-16 (1990). I do not see why a union's or an employee's obtaining of a new and arguably additional contractual right should necessarily deprive the employee of a preexisting statutory right. At least there should be an inquiry on a case-by-case basis as to the evidence of an intent to waive the procedures and remedies provided by the statute when adding the new contract protections. Similarly, here, I would not leap to the conclusion that a provision for contract arbitration automatically divests an employee of the option of recourse to the statute itself.

To maintain uniformity of regulation in areas over which Congress has exercised authority, the Supreme Court has developed an elaborate preemption doctrine concerning the displacement of state law. Where preemption turns on the existence of section 301 of the Taft-Hartley Act as the basis for enforcing contracts between unions and employers, the touchstone is apparently whether there has to be any significant interpretation of the labor contract in the course of entertaining the state law claim. Compare Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), with

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

Only if the state claim can be considered wholly separate and apart from the contract, as in the case of an employee's action under the antiretaliation provision of a state workers' compensation statute, is preemption avoided.

I agree with Professor Michael C. Harper that the Supreme Court has taken an overly simplistic view of contract preemption. Harper, "Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for Lingle and Lueck," 66 Chi.-Kent L. Rev. 685 (1990). Why, for example, should a union employee be denied the benefit of a state law right merely because a collective agreement might have waived the right, and there would have to be resort to contract interpretation to make that determination? Harper would substitute the following test: there should be no preemption of a state law action that exists independently of a collective agreement and can proceed without reference to rights secured or duties imposed by that agreement. I would propose a parallel principle for individual contracts of employment governed by an amended Federal Arbitration Act.

All of this has particular reference to the possibility of the states enacting the Model Employment Termination Act or some equivalent "good cause" legislation. Organized labor is deeply concerned that the protections of such laws might not extend, because of the current preemption doctrine, to unionized employees or at least not to employees covered by union contracts. I myself would think that only the most mechanical

application of preemption precedent would produce such a perverse result. After all, the Supreme Court in the past has exhibited substantial deference to state laws dealing with employment discrimination, "minimum labor standards," and worker welfare generally. See, e.g., Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714 (1963); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979). But cf. Barnes v. Stone Container Corp., 942 F.2d 689 (9th Cir. 1991). Indeed, I should think there could be constitutional questions presented if unionized workers wound up worse off than nonunion employees under state protective legislation, because they had exercised their rights under section 7 of the National Labor Relations Act to organize and bargain collectively. In any event, this is an issue that plainly calls for clarification. Even a generally salutary principle like federal preemption can be carried to mischievous extremes.

I am convinced that private dispute-resolution procedures may have a significant role to play in making statutory rights more accessible to employees, at a saving to everyone of time, money, and psychic wear and tear. I hope my comments will be of help to you in realizing that potential.